Supreme Court, U.S.
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No. 08-

IN THE
Supreme Court of the United States

D.V.K., JR.,

Petitioner,

v.

PENNSYLVANIA STATE POLICE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE PENNSYLVANIA SUPERIOR COURT

PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE QUESTIONS PRESENTED

(1) Whether the applicable statutory provision, 18 Pa.C.S. § 6105(f)(1), is impermissibly vague and violated the petitioner's right of due process guaranteed by the Fourteenth Amendment to the United States Constitution?

(2) Whether 18 Pa.C.S. § 6105(f)(1) violates the right to equal protection of the law guaranteed by the Fourteenth Amendment of the United States Constitution?

TABLE OF CONTENTS

	Page
STATEMENT OF THE QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF APPENDICES	iii
TABLE OF CITED AUTHORITIES	iv
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
INTRODUCTION AND STATUTORY PROVISION INVOLVED	1
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	9
1. 18 Pa. C.S.A. § 6105(f)(1) is unconstitutionally vague	10
2. 18 Pa.C.S.A. § 6105(f)(1) violates D.V.K.'s equal protection rights under the U.S. Constitution	16
CONCLUSION	20

TABLE OF APPENDICES

Page

Appendix A — Memorandum Of The Superior Court Of Pennsylvania Dated And Filed December 31, 2007 ..... 1a

Appendix C — Order Of The Supreme Court Of Pennsylvania, Western District Dated August 28, 2008 ..... 20a

Appendix B — Order Of The Court Of Common Pleas Of Allegheny County, Pennsylvania Dated June 2, 2006 ..... 12a

TABLE OF CITED AUTHORITIES

Page

Cases:

Addington v. Texas,
441 U.S. 418 (1979) 10

Commonwealth v. J.C.K.,
651 A.2d 144 (Pa. Super. 1994) 16

Foucha v. Louisiana,
504 U.S. 71, 112 S.Ct. 1780,
118 L.Ed.2d 438 (1992) 17, 18

Giaccio v. Pennsylvania,
382 U.S. 399 (1966) 11, 13

In re: Commitment of Donna Hutchinson,
454 A.2d 1008 (Pa.1982) 10

In re: Sealy,
218 So. 2nd 765 (Fla. App.1969) 12

Heller v. District of Columbia,
128 S.Ct. 2783 (2008) 19

Johnson v. Solomon,
484 F. Supp. 278 (D. Md. 1979) 17

Papachristou v. City of Jacksonville,
405 U.S. 156 (1972) 11, 12

Cited Authorities

Page

Reed v. Reed,
404 U.S. 71, 92 S. Ct. 251,
30 L.Ed 2d 225 (1971) 17

Royster Guano Co. v. Virginia,
253 U.S. 412 (1920) 17

Stamus v. Leonhardt,
414 F.Supp. 439, 451 (S.D. Iowa 1976) ... 11, 13, 15

United States v. Roach,
201 Fed. Appx. 969 (5th Cir. 2006) 19

United States v. Williams,
128 S.Ct. 1830, 170 L.Ed. 650 (2008) 15

Statutes:

18 Pa.C.S. § 6105(d) 16

18 Pa.C.S. § 6105(f)(1) ..... *passim*

Constitutional Amendments:

Second Amendment, U.S. Constitution 19

Fourteenth Amendment, U.S. Constitution ... *passim*

OPINIONS BELOW

The Memorandum of the Superior Court of Pennsylvania Dated and Filed December 31, 2007 is reproduced in Appendix A. The Order of the Court of Common Please dated June 2, 2006 is reproduced in Appendix B.

STATEMENT OF JURISDICTION

The Order of the Supreme Court of Pennsylvania dated August 28, 2008 denied a Petition for Allowance of Appeal. This Court has jurisdiction under 28 U.S.C. § 1257(a).

INTRODUCTION AND STATUTORY PROVISION INVOLVED

The within Petition for Writ of Certiorari should be granted because the Petitioner's constitutional guarantees provided by the Fourteenth Amendment have been abridged by the Pennsylvania Firearms Act. Specifically, 18 Pa.C.S.A. § 6015(f)(1) violates the Due Process and Equal Protection clauses of the Fourteenth Amendment as applied to the Petitioner and other similarly situated individuals.

Section 6015(f)(1) provides the procedure by which a person that has previously been civilly committed may seek an expungement of their mental health record and, therefore restore their right to possess and own a firearm.

The statute provides as follows:

> Upon application to the court of common pleas under this subsection by an applicant subject

> to the prohibitions under subsection (c)(4), *the court may grant such relief as it deems appropriate if the court determines that the applicant may possess a firearm without risk to the applicant or any other person.*

See 18 Pa.C.S.A. § 6105(f)(1).

Specifically, the statutory language, which gives the common pleas court unlimited discretion to "grant such relief as it deems appropriate" on a case-by-case basis, is impermissibly vague and promotes the denial of due process because it does not set reasonably clear guidelines for courts, thus, inviting arbitrary and discriminatory enforcement. The statute does not require courts to consider any objective criteria in determining whether an applicant "may possess a firearm without risk to the applicant or any other person." Therefore, the trial court has no standard to apply to these petitions, other than his or her own subjective beliefs about the type of individuals that should possess a firearm.

The Petitioner's only method of redress is to utilize the appellate courts of the Commonwealth of Pennsylvania where the standard that must be applied to the trial court's decision is abuse of discretion. How can the Petitioner establish to the appellate court that the trial court abused its discretion when the statute provides the trial court with unlimited discretion and sets forth no specific criteria for the trial court to consider? This dilemma is compounded by the fact that no appellate court in Pennsylvania has reviewed the statute and set forth any criteria that must be

established. In essence, the Petitioner and those in his position are forced to blindly attempt to establish that a nonexistent standard has been met. This is the antithesis of a statute that meets constitutional muster.

The statute similarly violates the Equal Protection clause of the Fourteenth Amendment because it treats similarly situated individuals differently as it relates to the right to possess a firearm. Section 6105 of the Firearms Act defines those individuals who are "persons not to possess" a firearm. D.V.K. meets the definition because he was civilly committed when he was a minor. Other "persons not to possess" under the statute include criminal defendants, illegal aliens and juvenile offenders. However, in addition to applying for an expungement, those individuals may also seek a pardon from the Governor in order to have their firearm rights restored.

The statute treats these similarly situated individuals differently without any justification. The statute was clearly designed to protect the citizenry of Pennsylvania from those individuals who cannot responsibly possess a firearm. Yet, the disparity in treatment among those individuals is not in any way related to that goal.

STATEMENT OF THE CASE

The petitioner, D.V.K., Jr. (hereinafter D.V.K.), was involuntarily committed to McKeesport Hospital on February 3, 1992, when he was fifteen years old. He was committed to the facility at the request of his mother, K.S., who was in the process of divorcing D.V.K.'s father. As discussed *infra*, the 1992 commitment occurred

because D.V.K. had been fighting with his sister, Amber, and K.S. was concerned that D.V.K. was becoming a disciplinary problem. D.V.K. has never been diagnosed with a mental illness, and he has not been admitted to a mental health facility or received any other type of mental health treatment since the February 1992 incident. (T.T. pp. 12, 20). D.V.K. is now thirty-two years old and owns several firearms, all of which were purchased in accordance with Pennsylvania law. He is an avid sportsman and has hunted regularly for the past twenty years without incident. However, when two handgun purchases were disallowed in 2005 and 2006, he was subsequently informed that he could no longer lawfully possess firearms due to the 1992 civil commitment, which had recently been documented in the Pennsylvania State Police database.[1] Upon learning of his status as a "person not to possess firearms" under state law, D.V.K. voluntarily surrendered his firearms in compliance with the law.[2] (T.T. p. 8).

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1. Initially, the database indicated that D.V.K. had been involuntarily committed in 1992 and 2004. However, the 2004 commitment was a clerical error by the Pennsylvania State Police and has been removed from the database. The attorney for the Pennsylvania State Police conceded the error during the hearing in this matter. (T.T. p. 4).

2. D.V.K. owns approximately twenty firearms including deer rifles, shotguns, and target rifles. He obtained all of the firearms legally. He was never denied permission to purchase a gun until 2005 despite the fact that the commitment took place in 1992. The Pennsylvania State Police explained that the information regarding the 1992 commitment was not entered correctly in their database until recently. (T.T. p. 14).

Shortly thereafter, D.V.K. retained private counsel and filed a petition for expungement of his civil commitment record, challenging the sufficiency of the evidence at the time of his committal and requesting relief pursuant to 18 Pa.C.S. § 6105(f)(1), which allows the orphans' court to grant relief it deems appropriate. (T.T. pp. 4, 5).

An expungement hearing was held on May 19, 2006, before the Honorable Robert A. Kelly of the Allegheny County Court of Common Pleas. D.V.K., Amber, and K.S. all testified regarding the circumstances of the 1992 commitment. D.V.K. stated that his mother called the police in January or February of 1992 after he argued with his sister about who was going to clean the dishes one evening. (T.T. pp. 15, 16, 22). However, he could not recall whether a physical confrontation ensued. (T.T. pp.16). D.V.K. testified that he may have threatened to kill his sister during the argument, stating, "I probably did, but it was not like a threat. It was more like a, just like a sibling thing, I think." (T.T. p. 15). D.V.K. also presented uncontradicted testimony that he has not had any mental health issues since February 1992, that he is proficient with firearms, and that he has always used them in a safe, lawful manner. (T.T. pp. 12, 13).

D.V.K.'s sister, Amber, testified that she and her brother fought often during their parents' divorce.[3] She stated, "I fought with both of my brothers.[4] We all fought

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3. D.V.K. was fifteen years old at the time of the commitment. Amber was twelve years of age.

4. D.V.K. also has a younger brother, Gregory K., who did not testify at the expungement hearing. (T.T. p. 25).

like just over stupid stuff, like if I wanted to watch this on TV or if I didn't want to do the dishes, you know, like just kid stuff." (T.T. pp. 45, 9-12). However, she never feared that D.V.K. would attempt to maim or kill her. (T.T. pp. 45, 46). Amber explained: "[W]e hit each other. I mean, I'm not going to lie about it, just over stupid stuff, not on a regular basis or anything, just a shove, a push, whatever, nothing life-threatening or anything like that." (T.T. pp. 45, 18-22). She also candidly admitted that as a child, she sometimes told D.V.K. that she wanted to kill him as well. (T.T. p. 46).

K.S. testified that when she requested the civil commitment for her son, she was involved in a "bitter divorce" and was having difficulty with D.V.K. talking back to her. (T.T. p. 26, 27). She also became concerned when D.V.K. was suspended from school for smoking cigarettes. (T.T. p. 38). K.S. stated that she and her children were attending family counseling during the divorce proceedings, and the therapist suggested that D.V.K. might be less of a discipline problem if he was committed to a mental health institution. (T.T. p. 26). "The therapist . . . suggested that because I was not very good at disciplining that, you know, if I had [D.V.K.] committed and stuff like that, that might scare him a little bit better and solv[e] some of the problems at home." (T.T. p. 29). K.S. testified that she did not believe D.V.K. posed a danger to the other children and that he had never been physically violent with her. (T.T. pp. 31, 32).

After all of this testimony was presented, D.V.K. submitted a report compiled by clinical and forensic psychologist Dr. Herbert Levitt. Dr. Levitt's report

indicated that D.V.K.'s MMPI-2[5] score was "within normal limits." Dr. Levitt further stated, "[I]t is not possible to state what his condition was fourteen years ago, but at this time, he shows no signs nor symptoms of mental illness and is considered to be within normal limits." Dr. Levitt also observed, "[T]here have never been any difficulties involving [D.V.K.'s] use of these weapons nor any safety risks." The report and D.V.K.'s MMPI-2 test results were admitted into evidence without objection at the May 19, 2006 hearing. (T.T. p. 52).

On June 2, 2006, Judge Kelly entered an order denying D.V.K.'s petition for expungement. (See Appendix B attached). Judge Kelly found that there was sufficient evidence at the time of D.V.K.'s involuntary committal to warrant that committal because a physician at McKeesport Hospital determined that D.V.K. posed a danger to himself or others.[6] (See Appendix B attached at p. 4, ¶ 36). The court also denied the petition for expungement under 18 Pa.C.S. § 6105(f)(1) on the basis that Dr. Levitt did not provide a prognosis for D.V.K., observing that "[t]here was no competent evidence that the Petitioner's prognosis would enable him to possess a firearm without risk to Petitioner or any other person." (See Appendix B attached, p. 4, ¶ 39). Accordingly, the

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5. The MMPI-2 is the Minnesota Multiphasic Personality Inventory-2 test, an instrument used by clinicians to assist with diagnosis of mental disorders and the selection of appropriate treatment methods. Revision of the original MMPI® by Starke R. Hathaway, PhD, and J. Charnley McKinley, MD.

6. D.V.K. was not represented by counsel at the 1992 hearing where this diagnosis was proffered.

court declined to grant relief because Dr. Levitt did not render an opinion as to D.V.K.'s future mental health status.

On June 22, 2006, D.V.K. filed exceptions to Judge Kelly's order, asserting that Dr. Levitt's report was competent and adequate evidence to allow expungement under 18 Pa. C.S. § 6105(f)(1). In addition, Dr. Levitt filed an affidavit clarifying his report, wherein he stated that based on his examination, he determined that D.V.K. currently exhibits no signs or symptoms of mental illness. Dr. Levitt also indicated that he has no reason to suspect that D.V.K. will pose a danger to himself or others in the future and that in his professional opinion, D.V.K. can lawfully possess a firearm without endangering himself or others. All of the opinions in his original report and affidavit were given with a reasonable degree of psychological certainty.

Judge Kelly denied D.V.K.'s exceptions on August 7, 2006. (See Appendix B attached). D.V.K. filed an appeal to the Pennsylvania Superior Court alleging that: (1) the orphans' court abused its discretion in denying expungement because D.V.K. presented competent and adequate evidence that would permit him an expungement of his mental health record pursuant to 18 Pa.C.S. § 6105(f)(1); (2) the applicable statutory provision, 18 Pa.C.S. § 6105(f)(1), was unconstitutionally vague and violated his right of due process guaranteed by the Fourteenth Amendment to the United States Constitution and Article 1 § 9 of the Pennsylvania Constitution; and (3) 18 Pa.C.S. § 6105(f)(1) violated the right to equal protection of the law guaranteed by the Fourteenth Amendment of the United States

Constitution and Article 1 § 9 of the Pennsylvania Constitution as applied to D.V.K., Jr. and other similarly-situated individuals. The direct appeal to the Pennsylvania Superior Court presented the first opportunity for D.V.K. to raise his constitutional challenges because D.V.K. was forced to initiate proceedings under the statute before he could challenge its unlawful application to himself and other similarly-situated individuals in the Commonwealth of Pennsylvania. In other words, the unlawful application of the statute was the act that gave rise to the instant claims.

A three-judge panel of the Pennsylvania Superior Court affirmed the order in question without addressing the constitutional issues, and the full court subsequently declined to grant *en banc* re-argument. (See Appendix A attached). D.V.K. then filed a timely petition for allowance of appeal to the Pennsylvania Supreme Court, which denied review on August 28, 2008. (See Appendix C attached). This timely petition for writ of *certiorari* followed.

REASONS FOR GRANTING THE PETITION

This case presents a matter of first impression as the appellate courts of Pennsylvania have declined to provide any pronouncement on the constitutionality of this statute, which gives judges unlimited discretion to deny expungement petitions, provides no guidance concerning the Petitioner's burden of proof, and violates equal protection principles.

1. 18 Pa. C.S.A. § 6105(f)(1) is unconstitutionally vague

The applicable statutory provision, 18 Pa.C.S. § 6105(f)(1), provides as follows:

> Upon application to the court of common pleas under this subsection by an applicant subject to the prohibitions under subsection (c)(4), the court may grant such relief as it deems appropriate if the court determines that the applicant may possess a firearm without risk to the applicant or any other person.

The statute is unconstitutionally vague and violated D.V.K.'s right of due process guaranteed by the Fourteenth Amendment to the United States Constitution. D.V.K.'s hearing for expungement stemmed from his 1992 civil commitment. A civil commitment constitutes a significant deprivation of liberty that requires due process protection. See *Addington v. Texas*, 441 U.S. 418, 425 (1979); *In re: Commitment of Donna Hutchinson*, 454 A.2d 1008,101 (Pa.1982). Here, the 1992 civil commitment is impacting D.V.K.'s property interest in owning and possessing a firearm and his right to bear arms.

The statutory provision at issue, 18 Pa.C.S. § 6105(f)(1), is impermissibly vague because it gives courts unbridled discretion to grant any type of relief they deem appropriate in any given case where an individual seeks expungement of an involuntary civil commitment. Furthermore, the statute does not provide any guidance as to the petitioner's burden of proof in

an expungement proceeding. A statute may be declared unconstitutional if it lacks standards "restricting the discretion of governmental authorities or courts who apply the law." *Stamus v. Leonhardt*, 414 F.Supp. 439, 451 (S.D. Iowa 1976) (citing *Papachristou v. City of Jacksonville*, 405 U.S. 156, 165-70 (1972); *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966). "While the vagueness doctrine has been employed most often in challenges to criminal statutes, civil statutes have also been subject to vagueness challenges." *Stamus, supra* at 451 (citing *Giaccio, supra*).

In *Stamus*, the United States District Court for the Southern District of Iowa examined civil commitment statutes that outlined the procedures for the involuntary commitment of mentally ill persons to state mental hospitals. The statutes provided, inter alia, that state officials could direct that a person be "admitted" to a hospital screening center if they determined that the admission was in that person's "best interests." *Id.* at 443. Thereafter, the person could be "committed" to a state hospital upon the recommendation of the superintendent of the hospital where the screening center was located. *Id.* Two individuals who had been involuntarily committed to mental hospitals in 1972 under the Iowa statutes filed suit against numerous individuals who participated in their involuntary hospitalization, alleging that the statutes violated Fourteenth Amendment due process guarantees and that they were unconstitutionally vague. Following United States Supreme Court precedent, the District

Court agreed that the statutes were impermissibly vague, reasoning as follows:

> The Iowa civil commitment statute is vulnerable to challenge, however, because it allows the county commissions of hospitalization too much discretion in determining what constitutes mental illness and what isin the subject's "best interest." The Supreme Court in *Papachristou v. City of Jacksonville, supra,* struck down a vagrancy ordinance as void for vagueness because in the absence of standards, it provided the law enforcement officers an opportunity for "arbitrary and discriminatory enforcement." 405 U.S. at 156, 92 S. Ct. at 839, 31 L. Ed. 2d at 110. The imprecise commitment standards of the Code create a similar opportunity for arbitrary and discriminatory application; the commitment laws can be applied to people who are merely annoying or bothersome to the decision-makers. *See, e.g., In re Sealy,* 218 So.2d 765 (Fla.App.1969) (Twenty-six year old man committed for treatment of "chronic schizophrenia" where the only evidence of "mental illness" was life-style characterized by the appellate court as that of a "typical hippie."). Under [the challenged statute], each commission member could determine subjectively, on an ad hoc basis, whether a person was "mentally ill" and what was the "best interest" of the individual. The possibility of arbitrary application of the law was especially likely in the civil commitment

> decision, where legal commentators emphasize the inherent subjectivity of psychiatric diagnosis and critics argue that mental illness is no more than a label placed on behavior which is annoying, burdensome, or frightening. The Court therefore finds that the commitment standards of [the Iowa statute] are unconstitutionally vague in the absence of standards restricting the discretionary authority of the commission members.

Id. at 452.

Applying these principles in the case at bar, it is clear that the statute in question is impermissibly vague. Section 6105(f)(1) provides that a court "may grant such relief as it deems appropriate if the court determines that the applicant may possess a firearm without risk to the applicant or any other person." Like the statute at issue in *Stamus*, section 6105(f)(1) gives courts unlimited discretion to determine whether an individual can possess a firearm "without risk" to himself or others. Absent any standards to guide the petitioner in obtaining relief, e.g., a requirement that the petitioner must present expert testimony certifying that he does not exhibit any traits or behavior that indicate a risk of future dangerousness, section 6105(f)(1) violates due process and is void for vagueness. *Accord Giaccio*, *supra* (statute that contained no standards and gave juries unlimited authority to order defendants to pay prosecution costs following judgment of acquittal was clearly unconstitutional; statute was impermissibly vague because it permitted imposition of costs if jury

found "some misconduct" on part of the defendant, and it offended due process because it contained no legal standards and invited arbitrary enforcement based solely on jurors' personal notions of what the law should be).

In *Stamus* whether a patient was civilly committed depended largely on the beliefs of the individual hospital county commission and, therefore, a patient's mental health status related to where that person happened to reside. Here, D.V.K. was before an Allegheny County judge that ultimately decided he was not entitled to relief. But, Pennsylvania has 67 counties. If D.V.K. resided in any of the other 66 counties his petition may have been granted. Under this statute, his constitutional interest depends on the judge's subjective beliefs, not any state-mandated criteria. Although justice is never always administered in a completely even manner, it should not be so totally random that a party cannot reasonably understand whether he is complying with the state's requirements.

In the instant case, the petitioner reasonably believed that he could obtain an expungement by demonstrating an eighteen -year history of safe firearm usage coupled with the positive results of a recent psychological evaluation. Instead, the trial court found that a lack of prognosis was the deciding factor and denied the petition for expungement on that basis. This, despite the fact that the statute has no prognosis requirement.

Due to the vagueness of the statute, the trial court was able to create a requirement that the petitioner

obtain a prognosis from a mental health professional in order to secure the requested relief. Another trial court judge might not recognize this requirement and grant the requested relief due to the fact that a prognosis is not mandatory under the statute. This is the essence of arbitrary and discriminatory enforcement.

Although keeping firearms out of the possession of those people who are not mentally capable of safely handling them is a valid state objective, the vague nature of the statutory language violates substantive due process. C.F. *United States v.Williams*, 128 S.Ct. 1830, 1845, 170 L.Ed. 650 (2008). (Observing that vague criminal statutes that permit arbitrary enforcement violate substantive due process rights). The statute sweeps unnecessarily broadly and therefore is not rationally related to the valid state objective.

Section 6105(f)(1) of the Firearms Act allows the Commonwealth to continue to deprive D.VK. of a significant property interest, owning and possessing a firearm as guaranteed by the Second Amendment, by essentially providing him without a clear avenue for obtaining relief. It is also important to note that denying D.V.K.'s expungement petition also deprives him of obtaining the relief that would seek to begin to remove legal and social consequences of the "stigma of mental illness which can be as debilitating as that of a criminal conviction." *Stamus Id.* at 449. For the foregoing reasons, Section 6015(f)(1) of Pennsylvania's Firearms Act should be deemed unconstitutional as applied to him and his Petition for Expungement should be granted.

2. 18 Pa.C.S.A. § 6105(f)(1) violates D.V.K.'s equal protection rights under the U.S. Constitution.

The statute violates equal protection because it fails to treat all citizens who are defined as "persons not to possess" under the statute in a similar manner. The statute identifies the following groups as "persons not to possess" a firearm: (1) *individuals who have been involuntarily committed to a mental health institution for inpatient treatment*; (2) illegal aliens; (3) *individuals who were adjudicated delinquent as a minor*; and (4) *individuals who have been convicted of certain enumerated offenses*. See 18 Pa.C.S.A. § 6105 (b), (c)4, (c)5, and (c)8. Convicted criminals, illegal aliens, and individuals with prior juvenile adjudications qualify for the exemptions codified at 18 Pa.C.S. § 6105(d)(1)-(3), which enables those groups to obtain relief in the common pleas court by, *inter alia*, proving that their conviction has been vacated or that they have obtained a full pardon from the Governor. See Pa.C.S.A. § 6105(d)(2). Under Pennsylvania law, criminal defendants and juvenile offenders may seek a pardon from the Governor as an alternate means of relief if their petition for expungement is denied. See *Commonwealth v. J.C.K.*, 651 A.2d 144 (Pa. Super. 1994).

By contrast, individuals such as D.V.K. who were involuntarily committed to a mental health institution for inpatient treatment have only one option: seek expungement in the common pleas court and convince the presiding judge, who has unlimited discretionary authority to grant or deny relief, that they "may possess a firearm without risk to the applicant or any other person." See Section 6105(f)(1). Section 6105(f)(1) of the

Firearms Act is subject to the Equal Protection Clause. See *Johnson v. Solomon*, 484 F. Supp. 278, 285 (D. Md. 1979). A person who has been involuntarily committed cannot petition the Governor for relief if his or her petition for expungement is denied. A regulation that arbitrarily discriminates between persons in similar circumstances is a denial of due process of law. See *Reed v. Reed*, 404 U.S. 71, 75, 92 S. Ct. 251, 30 L.Ed 2d 225 (1971). In *Reed*, this Honorable Court was tasked with determining whether an Idaho statute that gave preference to the appointment of male probate administrators violated equal protection. The *Reed* Court noted that "The Equal Protection Clause does . . . deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute." See *Reed supra*, at 75-76. The Court further explained that the classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."*Id.* (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). Accordingly, those who have been involuntarily committed are denied the same forms of redress available to criminals, aliens, and other similarly situated individuals who are prohibited from possessing firearms under the statute.

In *Foucha v. Louisiana*, 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 438 (1992), this Honorable Court held a Lousiana statute permitting the indefinite detention of insanity acquitees who are not mentally ill but could not prove they would not be dangerous in the future violated

the Fourteenth Amendment's due process and equal protection clauses. The Petitioner, Terry Foucha, had been found not guilty by reason of insanity on charges of aggravated burglary and discharge of a firearm in 1984. He was committed to a state hospital until medical personnel at the facility recommended he receive a conditional discharge in 1988. At the time of this recommendation, a three-person panel reported that Foucha was in remission of his mental illness but suffered from a personality disorder which is untreatable with medication. Based upon that, Louisiana authorities determined that Foucha should be held indefinitely because he could not prove that he would not be dangerous to himself or others. With regard to Foucha's equal protection argument, Justice White wrote the following:

> Louisiana law, however, does not provide for similar confinement for other classes of persons who have committed criminal acts and who cannot later prove they would not be dangerous. Criminals who have completed their prison terms, or are about to do so, are an obvious large category of such persons. Many of them will likely suffer from the same sort of personality disorder that Foucha exhibits. However, state law does not allow for their continued confinement based merely on dangerousness. Instead, the State controls the behavior of these similarly situated citizens by relying on other means, such as punishment, deterrence, and supervised release.

See *Foucha supra*, at 85.

D.V.K., like Mr, Foucha, is being treated differently from similarly situated individuals without any basis for the desperate treatment. Furthermore, this difference in treatment is not in any manner related to the objective of the statute. Clearly, the objective of the statute is to ensure that dangerous persons do not obtain firearms lawfully and, therefore, endanger members of the public. The statute has created a classification of persons not to posses based upon that objective. However, giving some individuals in the classification greater rights to lawfully obtain firearms than others is not reasonable and creates a completely arbitrary system that bears no rational relationship to the underlying goal of the legislation.

An individual cannot challenge the constitutionality of a statute unless he is injured by it. Clearly, D.VK. has been aggrieved by this statute. This unwarranted discrimination is arbitrary and capricious, and since the statute infringes on the fundamental individual's right to bear arms guaranteed by the Second Amendment to the United States Constitution it is subject to strict scrutiny. See *Heller v. District of Columbia*, 128 S.Ct. 2783, at 2799 and 2818 (2008); *See also United States v. Roach*, 201 Fed. Appx. 969 (5th Cir. 2006). In *Heller*, this Honorable Court recently held that the right to bear arms conferred by the Second Amendment to the U.S. Constitution is an individual right and that any legislation that abridges the Second Amendment right to bear arms, being an enumerated right, must face a strict scrutiny analysis. See *Heller supra*, at 2818.

In order to survive strict scrutiny, the statute must be justified by a compelling state interest and be

narrowly tailored to express only the legitimate state interests at stake. The petitioner concedes that the statute in question is justified by a compelling state interest in protecting the citizenry of Pennsylvania. However, the statute is not narrowly tailored to achieve that end because it treats similarly situated individuals differently for no apparent or stated reason.

CONCLUSION

The petitioner has established several compelling reasons for this court to grant the within Petition for Certiorari. Therefore, the petitioner respectfully requests that the Petition be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM OF THE SUPERIOR COURT OF PENNSYLVANIA DATED AND FILED DECEMBER 31, 2007

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 1755 WDA 2006

IN RE: D.V.K., JR.,

Appellant

Appeal from the Order Dated August 7, 2006
In the Court of Common Pleas of Allegheny County
Orphans' Court at No.: CC 367 of 1992

BEFORE: HUDOCK, STEVENS, and McCAFFERY, JJ.

MEMORANDUM: FILED: December 31, 2007

Appellant D.V.K., Jr. appeals the August 7, 2006 order of the Court of Common Pleas of Allegheny County, which denied exceptions to an order of the trial court which denied a petition for expungement. Appellant had sought expungement based on his desire to possess various firearms. We affirm.

The relevant facts and procedural history, as stated by the trial court, are as follows:

> On January 30, 1992, Petitioner was involuntarily committed to McKeesport Hospital pursuant to Section 7302 of the Mental Health Procedures Act, 50 P.S. § 7303

Appendix A

(Expungement Transcript of May 19, 2006 (herein after referred to as "E.T.") at pages 11, 12 and 19 and the McKeesport Hospital Record, which was admitted into evidence, at E.T., page 52). Petitioner filed a Petition for Expungement of Criminal Record pursuant to Sections 6111.1(g) and 6105(c) of the Pennsylvania Uniform Firearms Act of 1995 (hereinafter referred to as "Firearms Act"), 18 Pa.C.S.A. § 6111.1(g) and 18 Pa.C.S.A. § 6105(c) on May 2, 2006. In response to the Petition, a hearing was conducted by the Court on May 19, 2006 at which time the Pennsylvania State Police and the Allegheny County Department of Mental Health both participated through counsel (E.T. at page 3).

On June 2, 2006, this Court entered an Order dismissing the Petition and denying Petitioner the relief sought in the Petition. Petitioner then filed Exceptions on June 23, 2006 which this Court denied by its Order of August 7, 2006. In his Exceptions, Petitioner specifically abandoned his challenge to the validity of the involuntary commitment pursuant to Section 6111.1(g) of the Firearms Act, 18 Pa.C.S.A. § 6111.1(g) and is now basing this appeal entirely on the issues pertaining to Section 6105(f)(1) of the Firearms Act, 18 Pa.C.S.A. § 6105(f)(1).

Appendix A

> This appeal from the Court's Order of August 7, 2006 was filed on September 1, 2006. An Order was entered on September 20, 2006 pursuant to Pa.R.A.P. § 1925(b), 42 Pa.C.S.A. for Petitioner to file a concise statement of matters complained of on appeal. The Petitioner filed his Statement of Matters Complained Of on October 6, 2006[.]

Trial Court Opinion Pursuant to Pa.R.A.P. 1925(a) 11/3/06 at 1-2 (footnotes omitted).[1]

Appellant presents the following issues for our review:

1. Whether D.V.K., Jr. presented competent and adequate evidence that would permit him an expungement of his mental health record pursuant to 18 Pa.C.S. § 6105(f)(1)?

2. Whether the applicable statutory provision, 18 Pa.C.S. § 6105(f)(1), is unconstitutionally vague and violated the petitioner's right of due process guaranteed by the Fourteenth Amendment to the United States Constitution and Article 1 § 9 of the Pennsylvania Constitution as applied to D.V.K., Jr. and other similarly situated individuals?

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1. Appellant is now thirty years of age.

3. Whether the statutory provision at issue, 18 Pa.C.S. § 6105(f)(1), violates the right to equal protection of the law guaranteed by the Fourteenth Amendment of the United States Constitution and Article 1 § 9 of the Pennsylvania Constitution as applied to D.V.K., Jr. and other similarly situated individuals?

Brief of Appellant at 4 (suggested answers omitted).

Appellant initially contends that, contrary to the trial court's determination, he presented competent and adequate evidence that would permit expungement of his mental health record. Our standard of reviewing orders by the trial court, orphan's court division, is as follows:

> The findings of a judge of the orphans' court division, sitting without a jury, must be accorded the same weight and effect as the verdict of a jury, and will not be reversed by an appellate court in the absence of an abuse of discretion or a lack of evidentiary support.
>
> The rule is particularly applicable to the findings of fact which are predicated upon the credibility of the witnesses, whom the judge has had the opportunity to hear and observe, and upon the weight given to their testimony. In reviewing the Orphans' Court's findings, our task is to ensure that the record is free

> from legal error and to determine if the Orphans' Court's findings are supported by competent and adequate evidence and are not predicated upon capricious disbelief of competent and credible evidence. However, we are not limited when we review the legal conclusions that [an] Orphans' Court has derived from those facts.

In Re Wilton, 921 A.2d 509, 512-513 (Pa. Super. 2007) (internal citations omitted). The relevant statutory provision provides:

> **(f) Other exemptions and proceedings.—**
>
> (1) Upon application to the court of common pleas under this subsection by an applicant subject to the prohibitions under subsection (c)(4), the court may grant such relief as it deems appropriate if the court determines that the applicant may possess a firearm without risk to the applicant or any other person.

18 Pa.C.S.A. § 6105(f)(1) (bold in original).

Appellant claims that the trial court erroneously found competent and adequate evidence lacking based on a requirement not contained within the statute, particularly expert testimony regarding a favorable

prognosis for Appellant's ability to possess a weapon.[2] Appellant does not dispute that the expert letter[3]

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2. Appellant does not dispute that testimony of a qualified expert is required under the statute. His argument pertains to the substance of the testimony such an expert must present. Accordingly, we do not set forth the requirements for such expert testimony and the related case-law and simply address the issue of whether a prognosis of future mental health is required.

3. In relevant part, the letter by expert Dr. Herbert I. Levit, P.C. dated April 12, 2006 provides:

> He claims he has no memory of the events surrounding his admission. The record suggests threats against his sister and possibly his mother. Despite his memory loss for those incidents he denies any threats and claims it was normal arguing, though he does feel he may have said inappropriate things in anger. He describes his temper as "fair". He was recommitted while in the hospital, spending about ten days as an in-patient. Upon discharge he saw a psychiatrist twice. On the first visit he was taken off his medication and the second was terminated by the doctor. His memory is quite selective and suspect. He was oriented in all three spheres, his affect was within normal limits, there was some anxiety which seemed to be situational, and there were no abnormalities in his thought processes noted. Mr. Kramer is a hunter and gun collector, owning approximately twenty guns of various types. There have never been any difficulties involving his use of these weapons nor any safety risks.

(Cont'd)

proffered into evidence does not contain a prognosis; rather, he contends it was not required so that its omission cannot be a basis to deny expungment.[4] In an attempt to ascertain the intent of the legislature in drafting the provisions cited above, we turn to the rules of statutory construction. "Our goal in statutory

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(Cont'd)

> Psychological testing employed the Bender Visual Motor Gestalt Test, the House-Tree-Person Test, and the MMPI-2. He is of average or low-average intelligence, shows some possible memory impairment, and there may be some covert depressive features. There are features of withdrawal suggestive of suspiciousness. However, his computer scored MMPI-2 was within normal limits and showed no psychopathology. He did try to give an unrealistically "normal" impression, which is not unusual. It is not possible to state what his condition was 14 years ago, but at this time he shows no signs nor symptoms of mental illness and is considered to be within normal limits.

4. To the extent that Appellant attempts to tack on an affidavit of the expert, dated June 15, 2006, to the exceptions filed, setting forth a prognosis, we have reviewed thoroughly the briefs and arguments of the parties, the record before us, particularly the trial transcript, and the applicable law, and have examined closely the trial court's resolution of this issue. We are in agreement with the trial court's disposition in this regard and rely on the well-reasoned Opinion of the Honorable Robert A. Kelly, wherein Judge Kelly found the affidavit was not properly admitted into evidence so that it could not be considered in the determination of the exceptions or issues raised. *See* Trial Court Opinion filed 11/6/06 at 16-18.

interpretation is to 'ascertain and effectuate the intention of the General Assembly,' and we strive to give effect to all the provisions in a statute." ***Keystone Aerial Surveys, Inc. v. Pennsylvania Property & Casualty Insurance Guaranty Association***, 777 A.2d 84, 90 (Pa. Super. 2001) (citations omitted). "In so doing, we must begin with a presumption that our legislature did not intend any statutory language to exist as mere surplusage." ***Wiernik v. PHH U.S. Mortgage Corp.***, 736 A.2d 616, 620 (Pa. Super. 1999). (citations omitted). Accordingly, "whenever possible, courts must construe a statute so as to give effect to every word contained therein." ***Id.*** "It is presumed that the General Assembly does not intend a result that is absurd[.]" ***Bowser v. Blom***, 569 Pa. 609, 617, 807 A.2d 830, 835 (2002).

Considering the plain meaning of the statute in question, the legislative purpose is clearly to determine whether persons who have been involuntarily committed under the Mental Health Procedures Act, 50 P.S. § 7101 *et seq.*, should be prohibited from possessing firearms unless there is no longer a risk of danger to themselves or others from allowing such possession. This is consistent with the stated purpose of the Mental Health Procedures Act, which was set forth by this Court as follows:

> The clear and central intent of the General Assembly in enacting the Mental Health Procedures Act was to assure that those individuals who are severely mentally disabled will be provided with the medical care they

> need, for their own health and safety, and for the safety of others. Pennsylvania Courts have recognized that the state has a solemn duty to safeguard the welfare of the individual, and, additionally, the state is obligated to protect the welfare of others from the mentally ill.

In Re R.F., 914 A.2d 907, 915 (Pa. Super. 2006) (internal citation omitted).

Clearly, to demonstrate a lack of danger or risk, the future must necessarily be considered as the statute is designed to protect against any occurrences, present or future, as it is both preventative and protective in nature. To not require an expert to evaluate a person for future potential for danger or harm would circumvent the goal of the statute which is designed to protect the public from certain statutorily delineated person or persons. Obviously, once the requirement of the statute is met, possession of the firearms is permissible.

Utilizing the prognosis of an individual in determining future likelihood to harm another is not a novel concept. Although not previously presented with these particular circumstances, the prognosis of an individual has often-times been used to determine whether sanctions or other measures should be instituted. Some notable examples include the use of a prognosis in the diagnosis and classification of a person as a sexually violent predator, use of a prognosis to determine if an attorney's license to practice law should

be reinstated, and use of a prognosis to justify the length of a criminal sentence. ***See Commonwealth v. Dengler***, 586 Pa. 54, 890 A.2d 372 (2005) (mental health prognosis utilized to determine classification of defendant as sexually violent predator); ***In the Matter of John Anthony Lord Petition for Reinstatement***, 589 Pa. 543, 910 A.2d 1 (2006) (disbarred attorney reinstated upon prognosis that alcoholism would not affect his future practice); and ***Commonwealth v. Felix***, 539 A.2d 371 (Pa. Super. 1988), *appeal denied*, 525 Pa. 642, 581 A.2d 568 (1990) (prognosis of defendant's ability to be rehabilitated used to determine length of sentence). Accordingly, we cannot assign error to the trial court's determination that the lack of a prognosis for Appellant's future mental health required that expungement be denied.

Appellant's next two issues present challenges to the constitutionality of a provision contained within the statute. Before we address Appellant's constitutionality challenges, however, we must determine if they are waived for his failure to present the challenges to the trial court. The Pennsylvania Rules of Appellate Procedure require issues not raised in the lower court be waived because they cannot be raised for the first time on appeal. Pa.R.A.P. 302. Appellant did not raise these issues before the trial court or even in his exceptions to the trial court order denying expungement. Accordingly, these issues are waived. ***See In Re Estate of Schmidt***, 596 A.2d 1124 (Pa. Super. 1991), *aff'd*, 533 Pa. 86, 619 A.2d 1058 (1993) (constitutional challenges waived where not raised in

exceptions and raised for first time on appeal).[5] Therefore, Appellant's constitutionality challenges, raised for the first time on appeal, are waived.

Order **AFFIRMED.**

Judgment Entered:

s/ Eleanor R. Valecko
Deputy Prothonotary

DATE: December 31, 2007

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5. Appellant's issue is likewise waived on the basis that proper notice, pursuant to Pa.R.C.P. 235, was not provided to the attorney general. ***See Adelphia Cablevision Associates of Radnor, L.P. v. University City Housing Company***, 755 A.2d 703 (Pa. Super. 2000) (in action involving constitutional challenge to a statute in which Commonwealth is not a party, failure to give Rule 235 notice results in waiver).

APPENDIX B — ORDER OF THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA DATED JUNE 2, 2006

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

ORPHANS' COURT DIVISION

NO. CC 1052 of 1994

IN RE:

D.V.K., JR

PETITIONER

ORDER OF COURT

AND NOW, to-wit, this 2nd day of June, 2006, following a Hearing on Petitioner, D.V.K.'s, Petition For Expungement of Record of Involuntary Commitment in which Petitioner seeks expungement and/or relief from Petitioner's involuntary mental health commitment pursuant to 18 Pa. C.S.A. §6111.1 (g)(2), and it appearing to the Court that:

1. Petitioner, who was born on December 7, 1975, is a resident of Allegheny County.

2. On January 30, 1992, Petitioner was involuntarily committed to McKeesport Hospital pursuant to Section 7302 of the Mental Health Procedures Act, 50 P.S. §7302.

3. Petitioner's involuntary commitment was based on the Section 7302 Application of his mother who stated:

   "I feel D.V.K. may be using Drug, he will be up one time & the next min. he's mean, irritable, & aggressive. Wed. Jan. 22, he became verbally abusive & it progressed to a physical fight. D.V.K. threaten to "kill" his sister, little things make him Angry, he will respond violently. D.V.K. has admitted to drinking alcohol. Has been abused by his Father."

4. The Part VI Physicians Examination states: "Patient has had violent behavior at home and mood swings".

5. Doctor Lewis March certified the Petitioner to be severely mentally disabled and in need of treatment.

6. On February 3, 1992, after conducting a hearing pursuant to Section 303 of Mental Health Procedures Act; 50 P.S. § 7303, the Mental Health Review Officer, based on the testimony of Doctor Nunez that Petitioner was severely mentally disabled and presented a clear and present danger to himself or others, certified that he receive in-patient treatment for a period not to exceed ten days.

7. At the time of the aforesaid involuntary commitment, Petitioner was 15 years old and a student.

8. According to the testimony, Petitioner's mother and father were in the process of a bitter divorce which affected the Petitioner.

9. Petitioner testified that he did not recall threatening his sister and he also had no recollection of fights with his mother.

10. Petitioner admitted that he and his sister had an argument which could have gotten physical, but he does not recall.

11. Petitioner's mother testified that during the period of time preceding the aforesaid involuntary commitment, Petitioner frequently fought with his siblings and she was concerned and was advised to use involuntary commitment as a scare tactic to get better control over Petitioner and that the Section 7302 process was the only way the police could get involved.

12. The mother recanted her written statement in her testimony and said she was not afraid of physical violence and had no concern about Petitioner's mental health.

13. The mother also recanted her written statement in her testimony and said Petitioner never threatened her.

Appendix B

14. The mother testified that Petitioner did say he was going to kill his sister, but that this was "typical teenage" talk and not serious.

15. The mother's testimony was that she made a mistake and that she should have been a better disciplinarian.

16. Petitioner's sister testified that she was never afraid and that she and the Petitioner had "normal kid fights" which sometimes got physical.

17. The sister said she does not remember Petitioner threatening her, but she said she threatened Petitioner.

18. The sister testified that she never saw Petitioner hit his mother.

19. Petitioner's testimony was he voluntarily agreed to stay the last seven days of his treatment even though the record indicated a Section 7303 involuntary commitment.

20. Petitioner had two treatments after being discharged in ten days and has had no treatment since.

21. Petitioner is now 30 years old and is an avid hunter.

Appendix B

22. On April 11, 2006, Petitioner was examined by Dr. Herbert Levit, who reported that Petitioner's MMP 1-2 score was "within normal limits".

23. Dr. Levit also states: "It is not possible to state what his condition was 14 years ago, but at this time he shows no signs nor symptoms of mental illness and is considered to be within normal limits".

24. Petitioner told Dr. Levit that he owned approximately 20 guns at the time of the examination, but in his testimony, Petitioner said he gave those guns to relatives.

25. Petitioner is currently prohibited from owning or possessing firearms pursuant to Pennsylvania's UFA, 18 Pa. C.S.A. §6105 (c)(4) and the Federal GCA, 18 U.S.A. §927 (g)(4).

26. Petitioner desires expungement of his mental health records in order to be able to own and possess firearms.

27. Petitioner argues that he never had a mental health problem and does not now have such a problem.

28. One of the relevant expungement provisions is found at 18 Pa.C.S.A. §6111.1(g)(2) which states that "[A] person who is involuntarily committed

pursuant to section 302 of the Mental Health Procedures Act may petition the court to review the sufficiency of the evidence upon which the involuntary commitment was based was insufficient, the court shall order that the record of the commitment submitted to the Pennsylvania State Police be expunged. A petition filed under this subsection shall toll the 60-day period set forth under 6105 (a)(2)."

29. The only evidence entered proved that there was sufficient evidence upon which to base Petitioner's involuntary commitment. This evidence provided more than sufficient grounds to involuntarily commit Petitioner. *In re S.B.*, 777 A.2d. 454 (Pa. Super 2000).

30. The Court notes that at the time of Petitioner's Section 7302 involuntary commitment, the Petitioner was 15 years old and that he was not afforded the opportunity to consult with counsel.

31. The Court further notes that if the Petitioner had consented to the commitment, he may not be subject to the prohibition described in Paragraph 25 above.

32. The Court is concerned that the procedure which did not provide counsel to the then minor Petitioner may have deprived the Petitioner of due process of law and equal protection of our laws.

Appendix B

33. The Court knows of no appellate case that would provide guidance to the Court regarding this concern and in absence of appellate court guidance, the Court is hesitant to base its ruling on these concerns, but merely notes same for the record.

34. Petitioner's argument does not assert a procedural deficiency and, other than as noted above, this Court has found no procedural defects in the involuntary commitment. *In re J.K.*, 595 A.2d.1287 (Pa.. Super 1991).

35. In the case of *In re Woodside*, 699 A.2d. 1293, 1299 (Pa. Super 1997) the Court said: "Having found that the initial commitment was proper, we decline to order expungement of records relating to the event."

36. The Court finds that Petitioner failed to prove that the evidence upon which his involuntary commitment was based was insufficient and contrarily the evidence upon which the involuntary commitment was based was sufficient.

37. The other provision on which Petitioner could have sought relief is found at 18 Pa. C.S.A. §6105(f)(1) which states that "[U]pon application to the court of common pleas under this subsection by an applicant subject to the prohibitions under subsection (c)(4), the court

may grant such relief as it deems appropriate if the court determines that the applicant may possess a firearm without risk to the applicant or any other person."

38. Dr. Levit's report, which was admitted into evidence, provides no prognosis but concludes Petitioner "at this time Petitioner shows no signs nor symptoms of mental illness and is considered within normal limits".

39. There was no competent evidence submitted to the Court that proved that the Petitioner's prognosis would enable him to possess a firearm without risk to Petitioner or any other person.

40. The Court finds that the Petitioner failed to prove with credible evidence that Petitioner could possess a firearm without risk to either himself or to any other person.

NOW, WHEREFORE, it is hereby ADJUDGED, ORDERED and DECREED that the Petition for Expungement of Record of Involuntary Commitment is dismissed and the relief sought therein is denied for the reasons set forth above.

Per Curiam,

s/ Robert A. Kelly, J.
ROBERT A. KELLY

APPENDIX C — ORDER OF THE SUPREME COURT OF PENNSYLVANIA, WESTERN DISTRICT DATED AUGUST 28, 2008

IN THE SUPREME COURT OF PENNSYLVANIA WESTERN DISTRICT

No. 182 WAL 2008

Petition for Allowance of Appeal from the Order of the Superior Court

IN RE: D.V.K., JR.,

Petitioner

ORDER

PER CURIAM

AND NOW, this 28th day of August 2008, the Petition for Allowance of Appeal is DENIED.

Mr. Justice McCaffery did not participate in the consideration or decision of this matter.